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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 517

THE SIROCCO COMPANY,

Petitioner,

v.

THE CITY OF MIAMI.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA, AND BRIEF IN SUPPORT THEREOF.

SOL A. ROSENBLATT,
Counsel for Petitioner.

SOL A. ROSENBLATT,
JOSHUA BINION CAHN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

THE SIROCCO COMPANY,
Petitioner,

v.

THE CITY OF MIAMI.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The Sirocco Company, by its counsel, Sol A. Rosenblatt, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled cause April 1, 1941 (R. 86, 87) affirming the decree of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for Dade County (R. 79). Petitioner's petition for rehearing was denied May 9, 1941 (R. 90).

Questions Presented.

1. Whether lands were Public Lands within the meaning of Act of July 26, 1866 (c. 262, §8, 14 Stat. 253, 43 U. S. C., §932), in 1926 and 1927, where prior

thereto a valid homestead entry was made and final Certificate issued thereon, payment made and retained, and said entry was then erroneously cancelled, where after 1927 the Department of the Interior ordered said entry reinstated and ordered patent issued and on motion for rehearing by petitioner's predecessor in title gave said predecessor a preference right to perfect title and issued patent thereon?

2. Whether petitioner is entitled to compensation from respondent and to a lien on certain lands for such compensation, where petitioner is holder and owner of the following titles and equities to said lands: (1) rights of homestead entryman to whom final Certificate was validly issued and entry thereafter erroneously cancelled; (2) rights of holder of tax deed after sale on account of nonpayment of state and county taxes; (3) rights of supposed patentee whose patent was for many years considered to cover lands in question and which caused erroneous cancellation of homestead entry referred to in "(1)" above but which did not cover said lands; where petitioner and its predecessors in title were in continuous physical possession of said lands for seven and one-half years prior to appropriation and expended large sums to improve said land, and state, city and county taxes were assessed against said land during said period, where respondent then appropriated said land for two highways without compensation and where the Department of the Interior thereafter ordered said erroneously cancelled homestead entry reinstated and ordered patent issued thereon and on rehearing granted at request of petitioner's immediate predecessor in title, gave said predecessor preference right to perfect title to said lands and patent issued thereon?

Statutes Involved.

"Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres" (Act of March 3, 1891, c. 561, §5, 26 Stat. 1097, 43 U. S. C., §161).

"* * * after the lapse of two years from the date of the issuance of the register's receipt upon the final entry of any tract of land under the homestead or desert land laws, or under this section, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor" (Act of March 3, 1891, c. 561, §7, 26 Stat. 1098, 43 U. S. C., §165).

"The right of way for the construction of highways over public lands, not reserved for public

uses, is hereby granted" (Act of July 26, 1866, c. 262, §8, 14 Stat. 253, 43 U. S. C., §932).

"No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner or first secured to him by deposit of money * * *" (Art. XVI, Sec. 29, Constitution of Florida).

Statement of Facts.

On December 31, 1935 petitioner, the plaintiff below, filed its original bill of complaint (R. 1).

On June 24, 1939 petitioner filed an amendment to its amended bill of complaint (R. 1). On September 20, 1939 the last mentioned bill of complaint was dismissed unless petitioner should file a further amended bill (R. 56, 57).

On October 9, 1939 petitioner filed an amended bill of complaint, which is the bill of complaint herein involved (R. 57). In and by said bill of complaint (R. 63) Exhibits 1 (R. 2-24), 2 (R. 24-33), 3 (R. 33-51), 4 (R. 52-53) and 5 (R. 53-54), which were attached to petitioner's bill of complaint filed June 24, 1939, were made part thereof by reference thereto.

This complaint (R. 57-76) and the exhibits incorporated in it by reference (R. 2-54) was dismissed with prejudice (R. 79). No reasons were assigned for such dismissal. The dismissal was affirmed without reasons assigned (R. 86) and the rehearing petition denied (R. 90).

The bill of complaint and its exhibits allege the following facts which must be deemed admitted:

Petitioners derive their title to the land in question (two strips of land on Government Lot 2, plat of 1875, of Section 19, Township 53 South, Range 42 E.,

Dade County Florida) (R. 57) through various intermediate deeds (R. 58-61, 66-68, 72-73) from William H. Gleason, from Edward C. Pent and from Frank White (R. 58-59).

A patent was issued to William H. Gleason in 1878 covering *inter alia* Lot 2 of the Section in question according to the plat of *1845* (R. 59).

Edward C. Pent duly filed a homestead entry in 1890 covering *inter alia* Lot 2 of the Section in question according to the plat of *1875* (R. 59). In 1891 Final Commutation Receipt and Certificate executed by the Receiver of the Local Land Office in favor of Pent, showing payment in full of commutation price for the land in question was duly filed and recorded (R. 59-60).

On April 19, 1892 Pent's Cash Certificate and homestead entry were cancelled for conflict with the rights of William H. Gleason (R. 20, 25). The purchase money was not returned (R. 20, 25). *Gleason* v. *Pent*, 14 L. D. 375 (R. 25).

In 1895 a tax deed was issued from the State of Florida to Frank White covering the land in question for nonpayment of taxes for the year 1893 (R. 60).

In *Gleason* v. *White*, 199 U. S. 54 (which did not involve Frank White or his title), decided in 1905, this Court held that Gleason had no title to the lands in question under his patent, as lot 2 of the plat of *1845* did not cover any part of Lot 2 of the plat of *1875* (R. 26). There were dicta to the effect that the lands were public lands but the only question before the court was whether they were public lands as against Gleason. The Pent entry was not mentioned and neither Pent nor his successors in title were parties to the action.

In 1920 Henry T. Read attempted to select the land in question under the exchange provisions of the Act of June 4, 1897 (c. 2, §1, 30 Stat. 36) in lieu of certain lands in South Dakota within the limits of a national forest (R. 25).

In the same year the State of Florida attempted to make a swamp land selection of the same land (R. 25) (Act of Sept. 28, 1850, c. 84, §§1, 4, 9 Stat. 519, 520; Act of March 12, 1860, c. 5, §1, 12 Stat. 3, 43 U. S. C., §982) and an indemnity school selection (R. 25) (Act of Feb. 28, 1891, c. 384, 26 Stat. 796, 43 U. S. C., §§851, 852).

Francis S. Whitten, then holder of the rights of Gleason, Pent and White, protested the selection of Read (R. 25). The General Land Office rejected the claims of the State of Florida and of Read as in conflict with Gleason's rights (R. 25-26). The Department of the Interior affirmed the decisions of the land office in *Whitten, et al.* v. *Read*, 49 L. D. 253, 49 L. D. 260, 50 L. D. 10 (R. 26). These decisions were based upon the decisions which had originally cancelled Pent's entry, *Gleason* v. *Pent*, 14 L. D. 375, 15 L. D. 286; *Lewis W. Pierce*, 18 L. D. 328. A supplemental patent was ordered issued to Gleason to end the controversy (R. 26).

Based upon the decision of this court in *Gleason* v. *White*, 199 U. S. 54, which had held that Gleason had no rights in the land, Read obtained an injunction in the District Court of the District of Columbia which was sustained by the Court of Appeals of the District of Columbia on December 7, 1925 (*Work et al.* v. *Read*, 10 F. (2d) 637, 23 F. (2d) 139) restraining the issuance of a patent to Gleason or his representatives (R. 26).

The Solicitor General construed the order to mean that all claims or rights could be considered by the Department of the Interior excluding those based on Gleason's entry and patent (R. 26, 27).

Thereafter, hearings were held at which Read, the State of Florida and Whitten appeared (R. 28, 41, 63). The Local Register took testimony directed to the following questions:

> 1. Were the tracts shown on the plat of 1875 as lots 1 and 2 of said Sec. 19, or either of them of such character on September 28, 1850, as to pass title thereto to the State of Florida under the swamp-land grant? Who is now possessed of the rights of the State of Florida, if any, under the swamp-land grant?
>
> 2. Who is now possessed of Pent's rights, if any, under the commuted homestead entry?
>
> 3. Were these lots vacant land subject to homestead entry on June 19, 1920, the date the Read application was filed?
>
> 4. Is Whitten or his assigns entitled to a preferred right to make entry for lot 2? Is Whitten or his assigns (as to the north part) and Deering or his assigns (as to the south part) entitled to a preferred right to make entry for lot 1? (R. 3, 27-28, 62-63).

The decision of the Commissioner on appeal was that,

> "1. * * * Lot 2 as shown on this plat (1875) was not of such character to pass to the State of Florida under the swamp land grant * * *" (R. 32).

"2. The Sirocco Company, successor in interest of Francis S. Whitten is now possessed of the greater part of Pent's rights under the commuted homestead entry for lot 2" (R. 33).

"3. Lots * * * 2 were not vacant land subject to homestead entry on June 19, 1920 * * *" R. 33).

"4. Whitten and his assigns are entitled to a Preferred right to make entry for lot 2" (R. 33).

On appeal to the Department of the Interior (*Whitten et al.* v. *Read,* 53 L. D. 453, decided August 11, 1931), it was held that the original action of the Land Department in cancelling Pent's entry was unsupported by the law and the facts (R. 51) and that Pent's title to the lands, acquired by his entry, was such as to prevent further disposal of them by the Government to any one other than Pent (R. 51). As modified by this holding the decision of the Commissioner was affirmed and Pent's cancelled entry was ordered reinstated and patent issued (R. 51, 63, 64).

After the decision became final as to all parties (R. 52), Whitten asked for a preference right to purchase Lot 2 (R. 52). This request was granted (R. 53) and, modified to agree with this request, the decision was adhered to (R. 53, 64-65). *Whitten et al.* v. *Read,* 53 L. D. 469.

Meanwhile, and during the years 1926 and 1927, after Whitten had been making extensive improvements on the lands (R. 4-8, 11-13, 17, 30, 31, 61), respondent appropriated two strips of land on Lot 2, described in the Record (R. 68, 70-71) for two streets and has continuously operated said tracts as streets

since that time (R. 69, 71). These two streets are main arteries of travel known as Biscayne Boulevard and the Federal Highway, and could not be blocked off by petitioner (R. 74).

No compensation was paid to petitioner or its predecessor in title (R. 74) though demand was made (R. 74). The value of the tracts appropriated was $750,000 (R. 74).

The bill alleges rights in petitioner under the Homestead Laws of the United States pursuant to the Pent entry (R. 58, 59, 63-66 *et passim*), the Whitten patent (R. 65) and the White tax deed (R. 58, 60, 66 *et passim*), and alleges that the respondent had no rights under the highway grant of the Homestead Laws (Act of July 26, 1866, c. 262, §8, 14 Stat. 253, 43 U. S. C. §932) (R. 70, 72) and that the lands were not public land within the meaning of that law (R. 66).

The bill of complaint prays for a determination of the time of the respondent's appropriation (R. 75), the value of the land appropriated (R. 75), for a decree declaring that said value with interest be secured by a lien against the property (R. 75), for a decree directing the respondent to pay said sum to petitioner (R. 75-76), or that the land be sold to insure such payment (R. 76), and for other relief (R. 76).

Rulings of the Court Below.

The Circuit Court of the Eleventh Circuit of the State of Florida dismissed the bill of complaint herein without opinion and decreed that petitioner, having been offered leave by the Court to amend the said bill of complaint, and having refused to do so, said complaint, the cause of action and the case were dis-

missed out of court with prejudice (R. 79). The Supreme Court of Florida affirmed, merely stating that it seemed to the Court that there was no error in the decree (R. 86-87).

Previously, (*City of Miami* v. *The Sirocco Company*, 137 Fla. 434, 188 So. 344, set forth in the Appendix hereto) the Supreme Court of Florida had dismissed a former complaint upon the sole ground that the record did not disclose the source of the title of Wayne Realty & Investment Company, Whitten's predecessor in title (p. 436). The Court said that if Whitten had been a homestead entryman in regular course, there would be no question of petitioner's right to recover. The complaint herein involved cured that defect by showing title through Pent, a regular homestead entryman, but the opinion of the Supreme Court of Florida contains absolutely no word to indicate that any consideration was given to the Pent entry.

Reasons for Granting the Petition.

1. The Supreme Court of the State of Florida while assigning no reasons for its decree, necessarily held that the lands in question on which a valid entry had been made and erroneously cancelled were public lands when appropriated for a highway by the respondent.

The decision of this Court in *Cornelius* v. *Kessel*, 128 U. S. 456, held that the erroneous cancellation of a homestead entry did not impair the rights of the entryman or those claiming under him and that they could stand upon the original entry and were not obliged to invoke the subsequent reinstatement of the entry. The decision of the state court is in conflict with that applicable decision of this Court.

The Federal question involved is substantial since the decision of the Florida court opens the way to the appropriation without compensation of all lands upon which valid entry has been made if said entry has been cancelled through inadvertence or through clerical or legal mistake so long as no patent has been issued prior to the appropriation.

2. The Supreme Court of the State of Florida while assigning no reasons for its decree, necessarily held that the lands in question were public lands when appropriated for a highway by the respondent even though petitioner's predecessors in title held a tax deed to said land on account of nonpayment of taxes assessed after a valid entry had been made on said land and erroneously cancelled.

The decisions of this Court in *Carroll* v. *Safford*, 44 U. S., 3 How. 440, and *Witherspoon* v. *Duncan*, 71 U. S., 4 Wall. 220, held that lands upon which a valid entry had been made were subject to state taxation though patent had not yet issued and that a purchaser at a tax sale acquired a good equitable title to such lands.

The decision of the Florida court is in conflict with those applicable decisions of this Court.

For these reasons it is respectfully submitted that this petition should be granted.

THE SIROCCO COMPANY,
By SOL A. ROSENBLATT,
Counsel for Petitioner.

State of New York,
City of New York,
County of New York—ss.:

SOL A. ROSENBLATT, being duly sworn, deposes and says that he is the counsel for The Sirocco Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by The Sirocco Company is because the said petitioner is a Florida corporation, and deponent is its counsel.

SOL A. ROSENBLATT.

Sworn to before me this
14 day of August, 1941.

ROBERT A. PAPE,
Notary Public,
Kings County.
Certificate filed in New York County.